

NO. 48954-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ELIZABETH WITT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Susan Clark, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS
IN THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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I. IDENTITY OF MOVING PARTY

Nielsen, Broman and Koch, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i).

III. FACTS RELEVANT TO MOTION

By letter dated May 27, 2016, Nielsen, Broman & Koch was appointed to represent appellant Elizabeth Witt on appeal from denial of her motion to modify sentence to rescind a no contact order entered against her by the Clark County Superior Court on October 1, 2014, following a guilty plea for two counts of first degree theft, two counts of forgery, and one count each of second degree identity theft and unlawful possession of payment instruments.

In reviewing this case for appellate issues, Jared B. Steed, an attorney at Nielsen, Broman and Koch, performed the following:

1. Read and reviewed the verbatim report of proceedings from the guilty plea hearing on October 1, 2014.
2. Read and reviewed the entire Clark County Superior Court file in State v. Witt, No. 14-1-01583-6.

3. Researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review;

4. Attempted to contact appellant to explain the Anders¹ procedure and appellant's right to file a pro se supplemental brief;

(a) After receiving appellant's case, there was an indication that appellant was at the Washington Corrections Center for Women. Accordingly, on October 3 and 13, 2016, counsel checked the Department of Corrections (DOC) online inmate locator, running both appellant's name and DOC inmate number. The inmate locator did not reveal that appellant was still in custody at any DOC location.

(b) On October 3 and 13, 2016 counsel also checked the jail registers for Clark County and Multnomah County, but appellant was not shown to be in custody at either facility.

(c) On October 3, 2016, counsel also spoke with appellant's trial counsel by telephone, to see if he had further information about how to contact appellant. Counsel followed up with trial counsel by email on October 11, 2016. To date trial

¹ Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 83 S. Ct. 1396 (1967).

counsel has not provided me with any additional contact information for appellant.

(d) Having exhausted all leads, I have no ability to contact appellant to inform her of the Anders procedure and her right to file a pro se supplemental brief.

IV. GROUND FOR RELIEF

RAP 15.2(i) allows counsel to withdraw on appeal if counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S. 738, 83 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997), State v. Theobald, 78 Wn.2d 184, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 825 P.2d 336, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Witt to proceed pro se.

Nielsen, Broman and Koch submit the following argument and brief to satisfy its obligations under Anders, Theobald, Pollard, and RAP 15.2(i).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. The trial court erred in accepting appellant's guilty plea because it was not knowing, voluntary and intelligent.

2. The trial court erred in denying appellant's request to modify her judgment and sentence to rescind the no contact order.

Issues Pertaining to Potential Assignments of Error

1. Did trial court erred by accepting appellant's guilty plea to two counts of first degree theft, two counts of forgery, and one count each of second degree identity theft and unlawful possession of payment instruments?

2. Did the trial court err in denying appellant's motion to modify her judgment and sentence to rescind the no contact order between her and her child's father?

B. STATEMENT OF THE CASE

Appellant Elizabeth Witt was charged by the Clark County prosecutor with two counts of first degree theft, two counts of forgery, and one count each of second degree identity theft and unlawful possession of payment instruments, for a series of incidents alleged to have occurred between June 29, 2013 and July 1, 2014. CP 16-17.

On October 1, 2014, Witt pled guilty as charged. CP 18-38; RP² 11-16. In two separate cases, Witt also pled guilty to one count each of second degree burglary and first degree theft.³ RP 16-18.

At the plea hearing, Witt confirmed that she had discussed the statement of defendant on plea of guilty to non-sex offense sex offense with her defense attorney. Witt also engaged in a colloquy in which she confirmed she understood the constitutional rights she was giving up by pleading guilty, the nature of the charge and factual allegations supporting the charge, and the standard range sentence for each of the six felony charges. CP 18-38; RP 4-7, 13-16. The trial court accepted Witt's plea. RP 16.

Witt was sentenced to standard range concurrent sentences totaling 29 months imprisonment, with credit for 71 days already served. CP 40-54; RP 25. The court also imposed three months of community custody. CP 44. Witt noted that she was unemployed, but the trial court found her "employable." RP 9, 29.

² RP refers to the verbatim report of proceedings of October 1, 2014.

³ Separate notices of appeal were not filed for either of these cause numbers; however, the guilty pleas and sentence at issue in this appeal was entered simultaneously with the guilty pleas and sentences in nos. 14-1-01553-4 & 14-1-00141-0. RP 3-4, 16-21.

At sentencing, Witt noted that she was seven months pregnant with the child of her co-defendant, Luke Blakeman. RP 24-26. Witt requested permission to have contact with Blakeman in order to co-parent the child. The trial court declined to allow Witt to have any contact with Blakeman explaining, “I don’t think that benefits you in the least, or the child.” RP 28. The judgment and sentence accordingly prohibited Witt from having contact with Blakeman “during the period of supervision[.]” CP 44.

On August 13, 2015, Witt filed a motion and affidavit for modification of her sentence, requesting that the no contact order between herself and Blakeman be rescinded in order to facilitate co-parenting of their son. Witt attached to her motion genetic test results indicating a 99.99% probability that Blakeman was the father of her son. CP 76-84. The trial court denied the motion the following day. CP 93.

Witt filed a notice of appeal on September 2, 2016. CP 94. Witt’s motion for appointment of counsel on appeal notes that her gross pay per month is 55 dollars, that she owns no real or personal property, and that she has outstanding debts totaling twenty thousand dollars. CP 109-12. The trial court found Witt indigent and entitled to review at “public expense[.]” CP 117-20.

C. POTENTIAL ARGUMENTS

1. WITT'S GUILTY PLEA WAS INVOLUNTARY AND MADE WITHOUT A SUFFICIENT UNDERSTANDING OF THE CONSEQUENCES.

Due process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily with full knowledge of his legal and constitutional rights and of the consequences of the plea. Wood v. Morris, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Before a guilty plea can be knowingly made, a defendant must be advised of the direct consequences of his plea. State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996); State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980). The length of a sentence is a direct consequence of a plea. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

Before accepting a guilty plea, the court must ensure on the record that the defendant understands the nature of the charges against him and the consequences of the plea. State v. Walsh, 143 Wn.2d 1, 5-6, 17 P.3d 591 (2001). “A defendant must understand the sentencing consequences for a guilty plea to be valid.” Id. at 8 (quoting State v. Miller, 110 Wn.2d 528, 531, 756 P.2d 122 (1988)). Thus, the trial court is required to correctly inform a defendant who pleads guilty as to the maximum sentence on the charge. State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998).

A valid plea must represent “a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). It is a violation of due process for the court to accept a guilty plea without an affirmative showing that the plea was made intelligently and voluntarily. Boykin, 395 U.S. at 243, n.5; Barton, 93 Wn.2d at 304. The prosecution bears the burden of proving the validity of a guilty plea. Wood, 87 Wn.2d at 507.

An accused must possess an understanding of the law in relation to the facts before he or she can intelligently plead guilty and waive the right to trial. In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). “Ignorance and incomprehension are not the trademarks of an intelligent waiver, and a guilty plea based upon these infirmities cannot be said to be knowingly and voluntarily made.” Lutton v. Smith, 8 Wn. App. 822, 824, 509 P.2d 58 (1973) (citing Boykin, 395 U.S. 238). If a misunderstanding has led an accused to plead guilty, the plea is invalid because it was the product of ignorance and incomprehension and therefore is not voluntary. Id.

Witt could argue her guilty plea was not knowing, intelligent or voluntary because she did not understand the constitutional rights she was forfeiting by entering the plea.

2. THE TRIAL COURT ERRED BY FAILING TO MODIFY
THE JUDGMENT AND SENTENCE TO RESCINDE
THE NO CONTACT ORDER

Under CrR 7.8(b),⁴ a trial court may relieve a party from a final judgment for several enumerated reasons.

⁴ CrR 7.8(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentations, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment,

A trial court's ruling on a CrR 7.8 motion is reviewed for an abuse of discretion. *State v. Robinson*, 104 Wn. App. 657, 662, 17 P.3d 653 (2001), rev. denied, 145 Wn.2d 1002 (2001). The court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), rev. denied, 129 Wn.2d 1003 (1996)). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Parents have a fundamental liberty interest in the care, custody, and control of their children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The parent-child relationship is "essential" and "far more precious" than property rights. *Stanley v.*

order, or proceeding was entered or taken and is further subject to RCW 10.73.090, .100, .130, and .140. A motion under section (b) does not affect the finality of the judgment or suspend its operation.

Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). As a result, “[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.” Santosky, 455 U.S. at 753-54. Conditions that interfere with fundamental rights must be “sensitively imposed” so that they are reasonable necessary to accomplish essential needs of the State and public order. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Witt could argue the trial court abused its discretion by failing to amend the judgment and sentence to rescind the no contact order between her and Blakeman in order to facilitate co-parenting of their child in common.

3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Witt indigent and entitled to at “public expense[.]” CP 117-20. If Witt does not prevail on appeal, no appellate costs should be authorized under title 14 RAP. RAP 14.2; State v. Stump, 185 Wn.2d 454, 465, 374 P.3d 89 (2016); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Where a motion to withdraw is filed pursuant to Anders v. California, appointed appellate counsel petitions the appellate court for permission to withdraw, stating counsel has found no good faith basis for an argument on appeal. 386 U.S. at 738; Theobald, 78 Wn.2d at 185;

RAP 18.3. Under the Anders protocol, an indigent appellant, such as Witt, may still file a pro se supplemental brief, after she is served with the motion to withdraw. Hairston, 133 Wn.2d at 538. The Washington Supreme Court has upheld the Anders procedure, so long as the appellate court independently reviews the trial record before releasing counsel and dismissing the appeal. Id. at 541 (finding the Anders briefing and independent review maintains the constitutional right to counsel).

When the Court of Appeals dismisses an appeal under Anders, it merely grants appointed counsel's motion to withdraw as counsel, dismissing the matter in a manner the Supreme Court has found efficient and ethical. See Hairston, 133 Wn.2d at 541. The appellate court considering an Anders brief has not rendered an award or final judgment to either party, nor has it made a decision on the merits. The appeal has thus not resulted in a "substantially prevailing party," as required by RAP 14.2, since the appellate court has merely dismissed the appeal and permitted counsel to withdraw. Stump, 185 Wn.2d at 463-64.

Because neither party will have substantially prevailed if this Court dismisses Witt's appeal following this Anders brief, no costs should be assessed against Witt. RAP 14.2; Stump, 185 Wn.2d at 463-65; Nolan, 141 Wn.2d at 626.

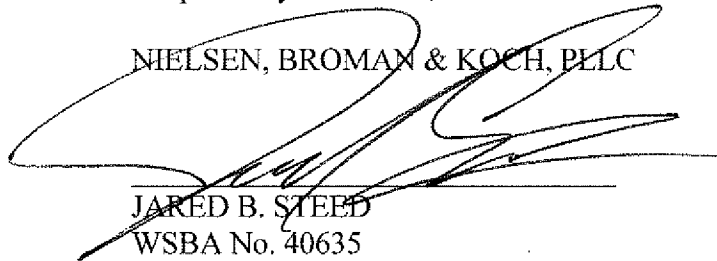
D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record, and to permit Witt to proceed pro se.

DATED this 31st day of October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

JARED B. STEED
WSBA No. 40635
Office ID No. 91051

Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC

October 31, 2016 - 9:10 AM

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